No. 370.

Brf. of Winslow, Carlisle & Taylor for Appt.

(17,484.)

Supreme Court of the United States,

OCTOBER TERM, 1899.

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No. 370.

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JOHN T. BOSKE, SHERIFF, &c., *Appellant,*

versus

DAVID N. COMINGORE, *Appellee.*

BRIEF AND ARGUMENT FOR APPELLANT.

Right of a State Court to compel a Collector of Internal Revenue to produce, and testify from, records in his office, showing the amount of distilled liquors on hand in bonded warehouses, in a proceeding on behalf of the State, wherein it was sought to have such liquors listed for regular state and county taxation.

Jurisdiction of United States District Court in *habeas corpus* proceedings.

***Constitutional* limitation on the power of the Executive Departments of the United States to make, alter or declare law.**

***Regulations* of the United States Treasury Department are not *laws*, but regulate its officers only in their *administrative* duties.**

The officers of the Treasury Department are bound to obey the plain provisions of the common law, except where otherwise provided *by statute*.

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Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 370.

JOHN T. BOSKE, Sheriff of Kenton County, Ky., Appellant, vs. DAVID N. COMINGORE, Appellee.	APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY. 17,484.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a judgment in a *habeas corpus* proceeding in which it was held that the restraint of the petitioner was in violation of the Constitution and laws of the United States and that he, therefore, be discharged.

The Commonwealth of Kentucky on relation of its Auditor by his duly appointed revenue agent for Carroll County, instituted a proceeding in the Carroll County Court against Louis T. Block and others, copartners as distillers, by which the Commonwealth of Kentucky sought to have listed, valued and assessed for taxation spirituous liquors in bond belonging to said Blocks, and theretofore omitted by them from such listing for State taxes as pro-

vided by law. The proceedings seeking to list, value and assess this omitted property were instituted in pursuance of sections 4241 and 4258 of Barbour & Carroll's compilation of Kentucky Statutes (1894) which are as follows:

SECTION 4241. SHERIFF OR AUDITOR'S AGENT TO LIST PROPERTY OMITTED.--SUMMONS AGAINST OWNER.—TRIAL.—PENALTY. It shall be the duty of the Sheriff or Auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the Assessor, Board of Supervisors, Board of Valuation and Assessment, or Railroad Commission, for any year or years. The officer proposing to have such property assessed shall file in the Clerk's office of the county in which the property may be liable to assessment, a statement containing a description of the property proposed to be assessed and the value of the corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years (days) after the filing of such statement, the Clerk of the Court shall issue a summons against the owner to show cause before the next Regular Term of the County Court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the Sheriff of the county by delivering a copy thereof to the owner, if in the county; if not, then to his agent, attorney or person in possession of the property. At the next Regular Term of the County Court after the notice has been served five days, if it shall appear to the Court that the property is liable for taxation, and has not been assessed, the Court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order of the Court deciding whether or not the property is liable to assessment, either party may appeal, as in any other civil cases, except that no appeal bond shall be required where the Court decides that the property is not liable to assessment for taxation. If the Court shall decide that the property is liable to assessment, the

Clerk of the County Court shall certify to the Auditor of Public Accounts and the Sheriff, a description of the property and the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As a compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The County Clerk shall enter all such assessments, the name of the persons against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment (see further Sec. 4258).

Section 4258. Auditor may appoint and remove agent in each county. The Auditor of Public Accounts may appoint an agent in each county of this Commonwealth. This agent shall hold his office and be removed at the pleasure of the Auditor (see further, as to duties, Sec. 4241, Transcript, p. 1).

The United States Government under laws which we deem unnecessary to cite to this Honorable Court, takes charge of all spirituous liquors manufactured in the United States from the time of manufacture until the tax which it imposes thereon has been paid. It requires these liquors to be kept in what are known as government bonded warehouses, and appoints, and places in charge of them, officers, known as storekeepers, who keep the keys to the warehouses and allow no one to enter without authority or express permission. It requires these storekeepers, under oath and bond, to ascertain and make and keep an accurate record of the amount of these liquors and report the same monthly to the Collector of the Internal Revenue district in which

the warehouse is situated (U. S. Rev. Stat., 3301). This monthly report embraces "* * * the "number of packages of all articles with the respect- "ive description thereof as above provided, which "remained in the warehouse at the date of his last "report, of all articles received therein or delivered "therefrom during the preceding month, and of all "articles remaining therein at the end of said "month." From these reports can be definitely and readily ascertained the true amount of liquors on hand at any given date.

By Section 3307 of the U. S. Revised Statutes, the distiller himself is also required to make a monthly report, showing among other things the number of wine gallons and of proof gallons of spirits produced and placed in the warehouse; and Section 3294 shows the form for application for withdrawal on payment of the tax thereon which may be made to the Collector at any time.

The Commonwealth of Kentucky by its laws requires the distillers to list and report for valuation and assessment for taxes the liquors so stored in such warehouses on such day in each year as is fixed for the valuing for taxation of other property in the State and taxes it only at the same rate as other property is taxed (see Kentucky Statutes, *supra*, Secs. 4105 to 4114, Appendix, pp. 44–46).

But for the reason among others that the United States Government takes actual custody and control of these warehouses and the liquors therein through its officers and especially these storekeepers, and holds it (now for a period of as much as eight years), in order to make sure of its heavy revenue tax thereon and to prevent frauds against that Government in the return of such property for taxation and the payment of the tax thereon, the State Government must wait until that tax due to the United States Government is first paid before it can proceed to hold such liquors for the taxes due to the State Government thereon and is thus placed at a disadvantage in ascertaining the quantity thereof in

such warehouses. By reason of the fact that these liquors were so held in custody and possession by the United States officers so that they could not be subjected to the annual payment of taxes, they for many years (until after 1882) eluded taxation for State and county purposes. Since that time attempts (more or less successful) have been made to tax them, deferring the payment of the tax until they should be withdrawn from bond; these attempts finally resulting in the enactment of Sections 4105 to 4114 of Kentucky Statutes.

But this was evaded in many instances, it is believed, by the failure to report anything like the full quantity actually on hand and the refusal of the officers of the United States Government in charge to allow the quantity to be ascertained.

Therefore in the proceeding referred to above, instituted in the Carroll County Court under the sections of the statutes quoted, the Collector of the district not being a resident of Carroll County, his deposition upon due notice was attempted to be taken at his office in order to prove by him from the records, which he admits are in his custody and control as Collector, the facts as to the true amount of such liquors subject to State and county taxation and omitted by the defendants in that proceeding, from their reports to the State for taxation for many years back (Transcript, p. 2).

At the taking of the deposition he declined to state the amount of such liquors from his records thereof in his custody as Collector, or to furnish copies of the records or to permit inspection thereof by the officers or agents of the State, saying that the records are in his custody as Collector only, and that by Section 3167 of the Revised Statutes of the United States and the rulings of the Department he is prohibited from doing so and he declines to do so (Transcript, p. 2).

Thereupon, in pursuance of the practice according to the Kentucky Code (Sections 535 and 538; see Appendix, p. 45), the officer taking the deposition,

and afterwards the Court itself, upon report to it by the officer, entered up judgment against him of fine and imprisonment, adjudging also that he should answer and give the information from his records, or copies from them, or permit an inspection of them so that copies might be taken. He is thereafter, and before the judgment of the Court for fine or imprisonment is attempted to be enforced, given another opportunity to answer and furnish the information soaght as evidence in the proceeding, and still declining to do so, he is taken into custody by the Sheriff of Kenton County, under the judgment both of the officer taking the deposition and of the court itself, for the purpose of enforcing it. He then files the petition for that purpose before the United States District Court at Louisville, and sues out the writ of *habeas corpus*, claiming "that the records of deposits of liquors in "bond and requests to withdraw liquor from bond "and official records made therefrom * * * "were privileged, and for that reason and because "of the said regulations of the Secretary of the "Treasury and the Commissioner of Internal "Revenue made conformably to law, he could not "be legally and he ought not to be required to tes- "tify as to the amount of said record or to file "copies of the same or to permit access to the "same" (Transcript, p. 4).

The regulation referred to as authorizing the refusal is copied in the transcript as Exhibit B on pages 8 and 9.

The appellant, as Sheriff of Kenton County, Ky., having appellee in charge under said judgment of the Court and writ from the officer engaged in taking the deposition, and being about to enforce the same by committing him to jail, was served with the writ of *habeas corpus*, and made his response thereto setting forth these facts, together with copies of the writ issued by the officer taking the depositions, and of the judgment of the Court, setting forth also certain correspondence with the Treasury

Department at Washington, and after setting forth the facts and his authority for arresting appellee in order to commit him for the contempt of court adjudged against him, the appellant as respondent in the proceedings set forth:

"that Sec. 3167 of Rev. Stat. of the United States "has no application to the question in controversy "and that the Secretary of the Treasury and the "Commissioner of Internal Revenue are executive "and not legislative officers of the Government, and "under the Constitution have no authority to make "laws or any rules or regulations to have such "effect, except upon their subordinates, with regard "to their relations as officers with the Government, "and that such must be made conformably to the "law of the land upon the subject of evidence and "cannot be of any force, as between the States or "the States and citizens or taxpayers to alter, "change, or effect the law regularly accepted or "adopted by the Government or enacted by the "regular legislative authorities, nor are the facts "sought to be elicited from the records and "documents as evidence and pertinent to the issue "involved, in any sense 'State secrets' or 'privileged communications" in contemplation of law "as heretofore adjudged by those appointed under "authority to exercise judicial functions in this "Government (*In re* Hirsch, 74 Fed. Rep., 928; 87 "Fed. Rep., 1005), and to sustain the witness and "direct him to be discharged from custody would "be to allow him, upon whom alone executive functions devolve in the discharge of the duties of his "office to be judge of the law as against the regular "elected county judge of the State county court, "and to uphold a law attempted to have been enacted by another merely executive officer of the "Government, and thus both legislative and judicial functions be usurped by the executive "officers" (Transcript, pp. 11-15).

This is the question involved in this appeal, the District Court having rendered a judgment discharging the prisoner on the ground that he was justified in declining to testify from his records, or to give copies of them or to permit access to them for the purpose of taking copies to be proven in evi-

dence in the State Court in order to show the quantity of liquors on hand in the bonded warehouses subject to State taxation, and adjudging "that the "imprisonment and detention of the relator by the "respondent is in violation of the Constitution and "laws of the United States."

ERRORS AND ARGUMENT.

I.

Taking the errors assigned appearing on page 30 of the Transcript, and points involved in them, in the inverse order in which they there appear, in order to leave the main point involved on the full merits of the case for the concluding part of our argument and to get at the questions in point of time as they arose, we commence with the third assignment as there laid down and argue it first.

THE COURT ERRED IN NOT RENDERING A DECISION DISMISSING THE PETITION DISCHARGING THE WRIT AND REMANDING THE PRISONER.

As we understand, the opinion of the Circuit Court of Appeals affirming the case of Hirsch, appearing in 87 Fed. Rep., 1005, a *habeas corpus* proceeding is not proper to determine a question like the one arising in this case; but we do not care to take up time to argue this point further than to state it except as the argument on the main question involved may also tend to elucidate this one (see also *ex parte* Reed, 10 Otto, 13–25), as follows:

"Here there was no defect of jurisdiction as to "anything that was done. Beyond this we need "not look into the record. Whatever was done, "that the Court could do under any circumstances, "we must presume, was properly done. If "error was committed in the rightful ex-"ercise of authority, we cannot correct it.

"A writ of *habeas corpus* cannot be made to "perform the functions of a writ of error. To war- "rant the discharge of the petitioner the sentence "under which he is held must be, not merely er- "roneous and voidable, but absolutely void" (*Ex parte* Kearney, 7 Wheat, 38; *ex parte* Watkins, 3 Pet., 193; *ex parte* Milligan, 4 Wall., 2. See also *ex parte* Crouch, 112 U. S., 178, and cases there cited).

II.

As to the error in refusing to permit the "in- "troduction of the testimony of the witness Max- "well S. Barker, as follows: That he while acting "as State Auditor's agent for Jefferson County, "Kentucky, had obtained from Collectors of In- "ternal Revenue, the information shown by their "records, documents and reports as to the amount "of liquors in the bonded warehouses and the times "and amounts of withdrawals of liquors from bond, "when he had the consent of the distillers as to "whose product the information was sought, &c."

Upon this point we wish to say that such testimony was pertinent as showing that the Internal Revenue Department did not regard these reports and documents as really containing any "State secrets" or as against "public policy" or else they would not give out the information when the consent of the distiller was obtained, and this position taken by the *department in actual practice*, with regard to these reports, is strongly cumulative evidence on this point as to their not containing any "State secrets," or being against "public policy," if any evidence is in fact needed other than the very nature of the facts required to be shown by them, which are mainly the amount of liquors deposited in the warehouses, and withdrawn from them and remaining therein at any given time, and especially at the close of business on the last day of each month and at the beginning of the succeeding

month. This *cumulative* evidence as to how the *department regarded* the information contained in the reports was only offered in extreme abundance of caution.

III.

The third error we take up (assigned as 1, in the assignment of errors) brings up the main question on the merits, as to whether "*The imprisonment "and detention of the relator by the respondent was "in violation of the Constitution and laws of the "United States*" (Transcript, p. 30).

Detention not in violation of Constitution.

The Court decides in the judgment, "that the "imprisonment and detention of the relator by the "respondent is in violation of the Constitution and "laws of the United States" (p. 11), but in the opinion the strongest and the only way it states the violation of the Constitution is thus (pp. 27-28):

"*If* the litigant has no right in or to the papers "in the hands of the third person, nor any legal "interest in them, it *might possibly* violate the 4th "amendment of the Constitution to force the latter "to produce them by an unwarrantable seizure, "actual or constructive; and in another connection "so far as the distillers' reports are concerned Boyd "*v.* United States might again apply."

Boyd *vs.* United States (116 U. S., 616), however, has no possible application to the case at bar. In that case the attempt was made to produce *private* papers, which were in the possession of the *defendant himself*, and the proceeding was a *quasi* criminal proceeding. *Such* a production might possibly be prohibited by the 4th amendment, though this Honorable Court was not unanimous on that point. In the case at bar there

is not a *single element* which is analogous to the Boyd case, for we were seeking evidence contained in *public documents* (as is *admitted in the prisoner's petition*) which were in the possession of a *third party* (*a mere witness*, having no interest whatever in the proceedings) and the proceeding was a civil action (as admitted by the learned Judge below) and there was no attempt whatever at any such search or seizure as is contemplated by the 4th amendment.

It is clear from this that the 4th amendment has no application to the case at bar, and as that is the only provision which is claimed to be violated, the lower Court clearly erred in holding that the prisoner was in custody in violation of the Constitution.

Detention not in violation of LAWS of United States.

From reading the judgment one would naturally be led to believe that the Court in the opinion to be written would cite some *statutory* provision of the law bearing directly on the point, and inhibiting any detention for such cause, but the opinion discloses none such. And the opinion before attempting to cite any statutory provision having any, even an *indirect*, bearing on the question, attempts to shift the points as stated in the judgment proper, where the burden of showing some such was rightfully left on the petitioner, and to place the burden on the respondent, stating the point in this way:

"But there is no statute or law of the United "States which *authorizes or permits* the collector of "internal revenue to make or certify for use by "any one else copies of the reports which have "been gathered for particular governmental pur- "poses." * * * "No statute is shown which "gives the litigant in this case any right to claim "the use of the property—the private property of "the United States—for any purpose whatever." "* * * The purpose for which the litigant desires "the property cannot effect the question of its right "to it. It would not be contended that the State of "Kentucky had any right to claim the property or

" its use except for the single quality it is supposed " to have of silently testifying upon the issues in- " volved in the case against Elias Block & Sons. No " logic is perceived in the possible suggestion that " that makes a difference in right, though it may " make the use more desirable in fact." * * * " No statute is shown to *justify* the claim now made, " though a statute is *necessary to make the claim* " *good.*"

We do not comprehend how the learned Court gets this idea that any statute of the United States is necessary to justify the claim made. To require this and put us on the affirmative is in contravention of Section 753 of the statutes under which the writ of *habeas corpus* was issued and which expressly prohibits the issuance of the writ unless the prisoner is in custody in *violation of the Constitution or of a law* of the United States. We claim that no United States statute is necessary on which to base our right to the evidence sought to be obtained, and no law other than the regular rules of the common law on the subject of evidence, and that the United States Government and its Courts recognize and accept these rules and the statutory rules enacted and adopted in the several States respectively as applicable to cases arising within their respective jurisdictions.

Having now shown that no right of the prisoner under the Constitution or statutes of the United States was violated, we will now show OUR ABSOLUTE RIGHT TO THE TESTIMONY UNDER THE COMMON LAW.

We were not allowed by the limited time at the command of the Court below on the trial, after we learned the position taken by him on this point, to argue or state it in a satisfactory manner. This right and the authorities on which we rely we now state more fully as follows:

FIRST.—As to the reports of the defendants themselves:

The evidence sought from the admissions or reports of the distillers to the Internal Revenue

Office as to amount of liquors made or on hand are not "privileged," but are mere admissions made at most under legal constraint, and clearly competent as such in this, a civil action.

"Evidence of an admission is not excluded in a "civil action, because it is made under *legal com-* "*pulsion*, if the person making it was not imposed "upon or under duress."

9 Am. & Eng. Ency., 1st Ed., 354, and
1 Am. & Eng. Ency., 2d Ed., 716, citing
Newhall *v.* Jenkins, 2 Gray, Mass., 562, and English cases.
See also 1st Greenleaf, Sec. 193, citing some English cases and giving digest of them in a note.

SECOND.—As to the reports and other records or documents made by the storekeepers and other officers or employees in the Internal Revenue Department:

These officers were public officers, under oath and bond to perform their duties. It was part of their duties to make these reports. They did make them. They were made from their own personal knowledge. Under such circumstances the law is plainly laid down as follows:

"Documents of a public nature and of public "authority are generally admissible in evidence, "although their authority is not confirmed by the "usual tests of truth, the obligation of an oath, "and the power of cross-examination. The ex- "traordinary confidence thus reposed in such docu- "ments is founded principally upon the circum- "stance that they have been made by authorized "and accredited agents appointed for the purpose, "but partly also on the publicity of their subject "matter; moreover, it would always be difficult, "and often impossible, to prove facts of a public "nature by means of actual witnesses examined "upon oath. To render such documents, when "properly authenticated, admissible as evidence,

" their contents must be pertinent to the issue. It " is also necessary that the document be made by " the person whose duty it was to make it, and " that the matter it contains be such as belongs to " his province, or comes within his official cogni- " zance and observation. *Documents having these* " *requisites* are, in general, admissible to prove, " either *prima facie* or *conclusively*, the facts they " recite.

* * * * * *

" The books of a public officer, in which he is re- " quired by a statute or by the nature of his office " to record his official transactions, are admissible " as evidence of such transactions. But these books " are in general evidence only of such facts as are " required to be recorded therein.

" OFFICIAL REPORTS.—When a person is required " by law to make a report or return of his acts, his " report or return is a public record of his act, and " as such admissible as evidence thereof."

9 Am. & Eng. Ency. Law (2d Ed.), 880, 883, 882.

See also—

1 Greenleaf, Secs. 483, 484.
2 Jones on Evidence, Sec. 520.

Greenleaf expressly mentions official registers of "*custom houses*," " tax rolls," &c., each of which cover the papers sought in this case. This Honorable Court has fully recognized the same rule as making admissible in evidence:

" Official registers of records kept by persons in " public office in which they are required, either by " statute or by the nature of their office, to write " down particular transactions occurring in the " course of their public duties or under their personal " observation (Taylor Ev., Sec. 1429; 1 Greenleaf Ev., " Sec. 483). To entitle them to admission it is not " necessary that a statute *requires* them to be kept. " It is *sufficient* that they *are kept in the discharge* " *of a public duty* (1 Greenleaf Ev., Sec. 496). Nor " need they be kept by a public officer himself, if the " entries are made under his direction by a person " authorized by him (Galt *v.* Galloway, 4 Pet., 332).

"It is hardly necessary to refer to judicial decisions "illustrating the rule. They are numerous."

Evanston *v.* Gunn, 9 Otto, 666–7.

And as to records kept by a jailer.

See White *vs.* U. S., 164 U. S., 100.

As to the plaintiff's right to have the documents, &c., produced to use as evidence, and to require the Collector to testify in regard thereto:

It is important to distinguish as to an inspection for the purpose of obtaining mere information, and the far more important act of producing testimony. Plaintiff is demanding testimony, which is shown to be extremely pertinent to the issue; it is only under peculiar circumstances that any one can be forced to give mere information or produce papers before trial; and it is likewise only under very peculiar circumstances that a court of justice, particularly in a civil case, will not compel a witness to tell the truth, and the whole truth, so far as the same may have come to the knowledge of the witness, and will not also compel the witness to produce any papers he may have which will tend to make out the case of the party demanding it. So far as we can call to mind the only exceptions are in cases where the testimony would tend to incriminate the witness himself, or where the matter about which he is asked to testify is a privileged communication. We will treat of these two exceptions later.

We find the following good, wholesome law on this subject:

"It may be laid down as a general rule that the "Queen's Bench Division will enforce by mandamus "the production of every document of a public na- "ture, in which any one of her Majesty's subjects "can prove himself interested. *Every officer*, there- "fore, appointed by law to keep records ought to "deem himself a trustee for all interested parties,

" and allow them *to inspect* such documents as con-
" cern themselves *without putting them to the ex-*
" *pense and trouble of making a formal application*
" *for a mandamus.* But the applicant must show
" that he has some direct and tangible interest in
" the documents sought to be inspected, and that
" the *inspection is bona fide required* on some
" special and *public ground*, or the Court will not
" interfere in his favor; and therefore if his object
" be merely to gratify a rational curiosity or to ob-
" tain information on some general subject, or to as-
" certain facts which may be directly useful in some
" ulterior proceedings, he cannot claim inspection as
" a right capable of being enforced.

" Thus the ratepayers of a county are not entitled
" to inspect and copy the bills and charges of county
" officers, which, having been paid by the Treasurer
" under orders of justices, have become items in his
" accounts and which have been allowed by the ses-
" sion and deposited by the clerk of peace among
" the county records. For in such case the individ-
" ual ratepayer would have no power to interfere,
" even though they might prove to demonstration
" that the bills had been improperly paid and al-
" lowed."

2 Taylor on Ev., 8th Ed., Sec. 1493, quoted in 19 Am. & Eng. Ency. Law (1st Ed.), page 230, note 4.

It will be noticed that the foregoing authority refers to an inspection. By how much the more can such records and documents be produced as evidence when clearly competent and pertinent. They are certainly "public"; our demand for them is certainly "*bona fide*" and "required on some special " and public ground"; and we desire to use it as evidence in the pending proceeding, and not in " an ulterior " or past proceeding nor as information on which to base a contemplated proceeding. The plaintiff certainly has "an interest" therein, as these papers sought to be produced contain evidence of its right to a large sum of money. Again:

" A postmaster cannot refuse to obey a subpœna
" to produce in court the record of his office contain-
" ing names of box-holders on the ground that it

" would be contrary to the regulations of the Post " Office Department."

Rice *vs.* Rice (N. J. Ch.), 25 Atl., 321.

This last authority is exceedingly close to our point. Again:

"In a proceeding for the forfeiture of distilled " spirits on the ground of a fraudulent violation of "the Internal Revenue Law the Government" (which was the plaintiff in this action) " will not be re- " quired, on motion of an intervening claimant, to " furnish such claimant before trial with the report " of the gauger showing the measurements of the " packages containing such spirits, such report being " of file in the proper district, and the claimant, being " entitled, on application there, to an inspection or " a certified copy of same."

United State *vs.* 164 8/100 Gal. Spirits, 82 Fed., 205.

The Court will find the above case in the same volume of the Federal Reporter as the case of "*In re* Weeks," relied upon by petitioner in Court below.

We presume it will not be seriously questioned that the right of one to be kept secure in regard to his private affairs, is more zealously guarded by the rules of law than public papers. In fact, the fourth Amendment to the United States Constitution especially protects private papers. This being true, the case of Marion National Bank *vs.* Abell's Admr., 88 Ky., 431, is a very strong one in point.

That first states four rules in regard to producing papers, which are not material to the issue in the case at bar except to show that the *Court went over the whole subject and announced the law in almost every phase.* Those four rules refer to production of papers not in evidence, but merely for information and inspection. After laying down those rules the Court proceeds to lay down another, as follows:

" Here it is not claimed that the appellee has any " right, title or interest in the books of the bank.

"All that is claimed is that said firms, under their "various firm names, made deposits in the bank, and "checked on them from time to time; that the ap- "pellee does not know how these accounts stand, "nor the number of firm names that appear on the "books of the bank as having had dealings with it, "but that the books will show these things, and "she wishes experts to overhaul them and report to "her.

"These officers of the bank are competent to tes- "tify to all these things. When they give their "depositions, if they should be taken, *either side* "*may compel them to produce the bank books*, and "*submit them to the inspection of the parties them-* "*selves and their attorneys*, or either of them, for "the purpose alone of inspecting the accounts be- "tween the bank and said firms; *also the officer* "*testifying may be compelled to give a full state-* "*ment of the accounts, item by item, as they appear* "*on the books, and to file with his deposition a* "*transcript of said accounts.* In this way, which "is the plain way pointed out by the common rules "for the prouction of evidence, the appellee can "obtain the whole truth, which is all that she is en- "titled to. No one ever heard of a witness being "ruled to make known to either party what "his testimony would be until after the "case was put under investigation, and he "put on the witness stand. We see no good "reason for making him submit his books to either "party, for his inspection, in advance of the time "that he may be required to introduce them as a "witness in the case."

Marion National Bank *vs.* Abell's Admr., 88 Ky., 432.

In this manner the Kentucky court of last resort clearly draws the distinction between producing papers for a mere inspection, and producing them as evidence. Where the person demanding the inspection had no right, title or interest in them the inspection was refused, but it is clearly and distinctly stated that the *witness has no right to refuse to produce them in evidence, when called upon to testify*, and that he may be required to testify as to each item in the account, and

further that he may be required to file with his deposition a transcript of said accounts. And the papers in that case were private papers, by how much the more we have the right to have public documents, records, papers, &c., produced or the facts shown by them adduced in evidence, which is exactly what we asked in the State court and which it granted. The reasoning and decision of a learned judge of a U. S. Circuit Court on a similar question, *in re* Hirsch 74 Fed., Rep., 933, afterwards affirmed by the Circuit Court of Appeals, sustains this decision of our State court of highest resort and seems to us thoroughly sound and conclusive. We quote from him as follows:

"Upon the subject of power generally in courts "of common law to compel by subpœna *duces tecum* "the production of written papers to be used as "evidence, the question with respect to both private "and public or official documents was carefully con- "sidered, and was settled by the Judges of the "Court of King's Bench in 1801, who decided that "such power existed, that a subpœna was the "proper method, and who, speaking by Lord Ellen- "borough, said that: 'The right to resort to means "' competent to compel the production of written "' as well as oral testimony seems very essential to "' the very existence and constitution of a court of "' common law, which receives and acts upon both "' descriptions of evidence, and could not possibly "' proceed with due effect without them (Amey *v.* "' Long, 9 East., 472).'

"The Court intended to assert the general power, "but took occasion to say that exceptional cases "would arise where it would not be enforced, as, "for instance, that a witness would not be com- "pelled to produce papers which he obtained confi- "dentially as counsel or attorney (King *v.* Dixon, 3 "Burrows, 1887; Miles *v.* Dawson, 1 Esp., 405; Bate- "son *v.* Hartsink, 4 Esp., 43).

"The question, then, *becomes one, not of power* "*generally*, but whether this class of evidence has "any special immunity peculiar to itself, or whether "the officers of the revenue have a special reason "for exemption as witnesses. An indefinite idea "exists that there is an unfairness in being a vehi-

" cle by means of which this evidence is obtained;
" but *there can be no implied obligation upon the*
" *government*, because it has received a special tax
" from an offender against the laws of the State,
" to shield from the consequences of his act. Such
" an idea is at variance with the statutes and the
" decisions of the Supreme Court."

In re Hirsch, 74 Fed., 933.

Having shown the existence of this general power under the common law, it is now proper to consider whether or not any exception to this general rule forbids the production of this testimony The Hirsch case treats of the exception clearly. On the question of "privilege" claimed under Section 3167, as amended by the "thirty-fourth section of the "Act of August 27, 1894," and the question as to any inconvenience that might arise from having to furnish such simple facts in evidence, it says:

" It is next said that these returns are privileged.
" It is probable that a statute could declare that
" communications of taxpayers to a board of asses-
" sors or officers of a similar character should be
" privileged, and that no returns can be examined
" by any one, or be reached for examination by
" legal process. The thirty fourth section of the
" Act of August 27, 1894, which endeavored to make
" income tax returns entirely free from examina-
" tion or inspection by unauthorized persons, did not
" go so far as to say that they could not be sub-
" jected to examination by courts, but declared
" their freedom from examination '*except as pro-*
" *vided by law.*' *In the absence of such provisions the*
" *returns now in question are no more privileged*
" *than other taxpayers' returns*, in the sense that
" they must be kept secret, and cannot be produced
" for the purpose of evidence in a legal proceeding
" by order of court.

" The remaining objection is that the officers may
" be subjected to inconveniences and to interruptions
" in the discharge of their official duties. It is un-
" doubtedly true that such occasional inconvenience
" will take place; but, so far as objections from this
" cause are concerned, the obligations of the officers
" of the internal revenue department, in regard to
" conformity with the requirements of a court for the

"production of books and papers, are much like "the obligations of the members of a large mer- "cantile firm or the officers of a business corporation. "Individuals are compelled to furnish this class of "evidence in cases in which they have no interest; "and, though the officers of corporations have "urged the inconvenience of being compelled to "carry their books into court for the benefit of "others, such an objection has not prevailed in the "Federal courts.

"It may be inconvenient, and sometimes embar- "rassing, to the manager of a corporation to re- "quire its books and papers to be taken from its "office and exhibited to third persons, but it is also "inconvenient and often onerous to individuals to "require them to do the same thing. Considera- "tions of inconveniences must give away to the par- "amount right of litigants to resort to evidence "which it may be in the power of witnesses to pro- "duce, and without which grave interests might be "jeopardized and the administration of justice "thwarted" (Wertheim *v.* Trust Co., 15 Fed., 716). "As a matter of course, a court will exercise its "sound discretion with reference to the neces- "sities of the case, and will not ordinarily com- "pel the detention of books which are in "daily use, or compel public officers to bring public "documents into court when the production of "copies will equally answer the purpose (Corbett *v.* "Gibson, 16 Blatch., 334, Fed. Cas. No. 3, 221; De- "laney *v.* Regulators of City of Philadelphia, 1 "Yeates, 403)".

In re Hirsch, 74 Fed., 934.

Another objection set forth in the opinion of the Court below in the case at bar is as follows:

"In many cases copies of the public records of "the United States may be authorized by the "head of the department or other ultimate custo- "dian. * * * But there is no statute or law of the "United States which authorizes or permits the "collector of internal revenue to make or cer- "tify for use by any one else copies of the reports "which have been gathered for particular govern- "mental purposes" (Tr., p. 21).

The learned Judge in the Hirsch case had fully met that point as follows:

"The point was made by the petitioner that he did "not have the legal control of the papers, which "were in the legal control of the collector of the "district; and the case of Bank *v.* Hillard, 5 Cow., "158, was cited, in which it was held that the clerk "of a banking house was not bound to produce its "books, upon a subpœna *duces tecum*, the cashier "being the proper custodian. In this case the "collector's office was in Hartford, while the peti-"tioner's office was at Norwich, where the papers "were actually kept and were in his actual custody. "It is not necessary to serve a subpœna upon the "person who is merely technically in control, but "who is not in the town, and not in charge of the "office where the papers are actually kept. The "person in actual possession, as the head of the "office where the papers are actually kept, should "produce them (Corsen *v.* Dubois, 1 Holt, 239; "Amey *v.* Long, 1 Camp., 17)."

In re Hirsch, 74 Fed., 934.

It will be noticed that in the Hirsch case the point was made that the deputy, though having the papers in actual custody, was not the custodian and should not produce them, but the Court held that the actual custodian (as in this case the collector admits himself to be), and not the head of the Treasury department, is the proper person to re quire to produce them. This case further develops the soundness of that rule. For if the State must go to the head of the department of the treasury, he might be beyond its jurisdiction by process of contempt, and certainly it would occasion more trouble and inconvenience for him to have to submit to an examination as a witness, than the collector to whom as the actual custodian of the papers the Secretary of the Treasury would in all probability have to send or else remit the party seeking the facts to him, as the actual custodian of them.

The regulations relied on not authorized.

The regulations relied on and copied in full on pages 23 and 24 of the transcript are not authorized by any statute.

Congress has never attempted, either in sections 161, 251, 321 or 3167, or any other section of the statutes, to confer any such power on the Commissioner or the Secretary of the Treasury.

In all of said sections except 321 Congress has always placed the clear restriction that the regulations must be "not inconsistent with law," and section 321 only authorizes the Commissioner to prepare and distribute regulations "pertaining to the assessment and collection of internal revenue." The document relied on by the District Court and called a "regulation" in no way pertains to the "assessment or collection of internal revenue," but contains merely the legal opinion of the Commissioner as to the power of the courts to compel the production of certain evidence, *with instructions to the Collector to disobey the orders of the Court*, in case the courts hold to an opinion different to that entertained by the Commissioner.

If Congress did attempt to confer upon the Commissioner of Internal Revenue or upon the Secretary of the Treasury the power to make laws, such attempt would be absolutely void under the very first section of the United States Constitution which vests all legislative power in Congress.

Furthermore, while the Commissioner is clearly entitled to have an opinion as to what is the law, he has no authority to declare the law as a finality, and to set his opinion above that of the courts. To permit him to do so is to violate Section 1, Art. III., of the Constitution.

Let us elaborate the foregoing statements briefly.

Under Section 161, we cheerfully accord the heads of the departments the authority to prescribe "regulations," but they must be *regulations*, not laws, for

the section expressly recognizes the constitutional limitation, and says they must be "not inconsistent with law." Then what does the section expresely say the regulations are to be for? "*for* the government of his department," (for) "the conduct of its officers and clerks," (for) "the distribution and performance of its business and the custody, use and preservation of the records, papers and property belonging to it," *i. e.*, that they are to be merely and purely as to their effect *administrative only* in their nature and do not affect things other than the administration of the department, and cannot take the department and its officers out from under the regular laws of the land, as is claimed for them in these proceedings.

Section 251 (evidently referred to by mistake in the opinion of the Court below as 261), contains this same provision of limitation, viz.: "Not inconsistent with law," and upon careful reading shows itself to be of the same nature, *i. e.*, that the "forms of entries, oaths, bonds and other papers and rules and regulations, not inconsistent with law" and authorized under it, are to be merely and purely administrative in their nature, and do not effect the general rules of law in the courts. But the regulation relied upon and printed in the record was more likely intended to be drawn under the assumed authority of Section 321, which authorizes a regulation by the Commissioner, under the direction of the Secretary; but it overleaps the power given in that also. The portion of that section at all applicable to the question reads, as follows:

"The Commissioner of Internal Revenue, under "the direction of the Secretary of the Treasury, "shall have general superintendence of the assess- "ment and collection of all duties and taxes now "or hereafter imposed by any law providing in- "ternal revenue, and shall prepare and distribute all "the instructions, *regulations*, directions, forms, "blanks, stamps and other matters pertaining to the "assessment and collection of internal revenue.

Notice the wording again. "Regulations." Regulations what? "Regulations pertaining." Pertaintaining to what? Pertaining to the *assessment and collection of internal revenue.*" Surely it will not be seriously claimed that this confers any authority upon the Commissioner *to change the rules of the common law in regard to the production of evidence.* The power to *change law* is vested solely in Congress by the very first section of the Constitution, consequently if Congress did attempt to confer any such authority upon the Commissioner it is null and void. Neither has the Commissioner any authority to *declare law as a finality*, as the first section of the third article of the Constitution expressly confers this upon the judiciary.

In support of our construction of these sections of the statutes authorizing the making of regulations by the Treasury Department, we quote again from the Hirsch case as follows:

"It is probable that *a statute* could declare that "communication of taxpayers to a board of asses- "sors or officers of a similar character should be "privileged, and that no returns can be examined "by any one, or be reached for examination by "legal process. The thirty-fourth section of the "Act of August 27, 1894, which endeavored to "make income tax returns entirely free from exam- "ination or inspection by unauthorized persons, did "not go so far as to say that they could not be sub- "ject, to examination by courts, but declared their "freedom from examination 'except as provided by "'law.' *In the absence of such provisions* the re- "turns now in question are no more privileged than "other taxpayers returns, in the sense that they "must be kept secret, and cannot be produced for "the purpose of evidence in a legal proceeding by "order of Court."

In re Hirsch, 74 Fed., 934.

By referring to the thirty-fourth section of the Act of August 27, 1894, it will be found that that section of that act is an amendment to Section 3167 of the Revised Statutes (which is one of the sections

relied on by the petitioner and cited by the lower Court in support of its opinion). The above quotation from the Hirsch case shows clearly that there has been no attempt by the lawmakers to prohibit the production of this evidence by the Court. And it not only shows that no such attempt has been made by the lawmakers, but states clearly that in the absence of such a provision these returns or reports are no more privileged than *other taxpayers' returns*, so far as the power of the Court is concerned, and that it was clearly erroneous for the lower Court to say that the State of Kentucky must show some United States *statute* authorizing the Collector to produce them or testify as to their contents.

A reasonably close scrutiny of the sections relied on shows that the legislative branch of the government in enacting them kept well in mind the guarding of this legislative prerogative confided to it by the framers of the Constitution.

This point does not appear to have been raised, and if raised, was evidently not well considered, in the opinions of the District Court Judges in the Huttman case and the Weeks case, referred to in the opinion of the lower court.

There is also a very great distinguishing difference between those two cases and the case at bar. In those cases the evidence was attempted to be obtained for use in criminal proceedings The present proceedings grew out of a civil action, and in this civil suit the defendants could have been compelled to testify as to any point concerning which the collector was called upon to testify. They were perfectly competent, but if they had been introduced by the plaintiff in the action it would necessarily be bound as to their credibility, which plaintiff did not, and does not care to do. Even the Hirsch case cited above arose out of State court proceedings in a case of a criminal nature; otherwise it seems to be about as analogous to the proceeding out of which this appeal grew as two cases ever get

to be, and there the petitioner was remanded to custody by the Circuit Court, and that decision was affirmed by the Circuit Court of Appeals (87 Fed. Rep., 1,005). That Appellate Circuit is the same to which the Weeks case, if taken up would have gone on appeal. It would thus appear that if the Weeks case, relied upon for the petitioner here, had been appealed, the decision of the District Judge would have been reversed.

The Hirsch case, in a nutshell, as quoted from the syllabus, reads:

" An internal revenue collector is not justified in " refusing to produce, in obedience to a subpœna " *duces tecum* issued by a State court, the applica- " tion or return made by a person who desires to " pay the tax imposed by the statutes of the United " States upon persons engaged in the retail liquor " business either by the nature of such documents " or by alleged instructions from the Commissioner " of Internal Revenue not to produce such papers " for use in evidence in the State courts."

In re Hirsch, 74 Fed., 928.

The sound reasoning of Circuit Judge Shipman on this point seems conclusive. It shows that the right of the State to such evidence, under the rules of law in the courts, cannot be controlled by any general letter of instructions to subordinates, by either the Commissioner of Internal Revenue or the Secretary of the Treasury, nor by any refusal such as was made directly by the Treasury Department in the course of these proceedings, as shown by the correspondence, copied on pages 13 and 14 of the transcript. Upon this point we quote again:

" This letter and others of like character, which " may be presumed to exist, are not the regulations " in regard to the assessment of the internal revenue " which have the force of a statute. They express " the views of an officer of the government upon " the power of the State Courts, and upon the pro- " priety of admitting this class of testimony in cases " of prosecutions for the violation of State " laws; and, while they are entitled to

" respectful consideration, they neither authori-
" tatively declare general principles, nor
" establish general rules in regard to the subject of
" obedience to the orders of a court in the matter
" of evidence. They are not general *regulations*,
" *but are instructions based upon the Commis-*
" *sioner's legal opinion of the powers of a court in*
" *a particular class of cases.*"

In re Hirsch, 74 Fed., 932.

It is true that the alleged regulation in the Hirsch case was merely a letter of instruction, addressed to a particular collector, and does not appear to have been promulgated in the form of a regulation. In the case at bar it has assumed the form of a regulation, but is nothing more nor less than a *general circular letter of instructions* in regard to matters concerning which the department was not and is not authorized to make any regulation, being merely the legal opinion of the Commissioner as to the powers of the Courts in regard to the production of evidence.

As analogous, we quote from Fleming *vs.* Stahl, 83 Fed. Rep., 943, in regard to the force of "regulations" under the civil service law:

" The only remaining question is as to whether or
" not the Civil Service regulations made by the
" Civil Service Commission and the President, and
" promulgated by the latter, can have the effect, in
" any wise, to modify, alter or change the statute.
" On that point, I content myself with the discus-
" sion of Mr. Chief Justice Cox, in Woods *v.* Gary
" *supra*, and concur in the conclusion reached by
" him, that no such power exists either in the Civil
" Service Commission, or in the President or in both
" combined. I concur also with him, in the con-
" clusion that the Civil Service law never contem-
" plated that the President, or the Commission,
" or both, could make any rule or regulation
" which could have the force or effect of law.
" True, the President may make rules and regula-
" tions administrative in their nature, which would
" govern the policy of his administration, and he
" could enforce the same by the removal of any per-
" son from office who refused to abide thereby, but

"they could not have the force and effect of law, "nor would the Courts enforce them. Such rules "and regulations are purely administrative, and "may be altered, amended or repealed by the Presi- "dent at any time or by his successor in office."

This Honorable Court has also said as to a similar regulation:

"The regulations of the department cannot have "the effect of amending the law. They may aid in "carrying the law as it exists into execution, but "they cannot change its positive provisions.

U. S. *vs.* 200 Bbls. Whisky, 95 U. S., 571.

It may, perhaps, be urged that this so called regulation of the department is a reasonable rule and relieves the department from a great deal of inconvenience and that the testimony can be gotten in the way laid down in the regulation. We have already shown by the Hirsch case that the mere fact that one is inconvenienced, or even embarrassed, by being compelled to testify in certain cases, is no reason for excusing him. The inconvenience or embarrassment is immaterial so long as the law gives the right. But it is clear from the record in this case that the question here is not as to the method of procedure, but is in regard to the absolute refusal of the department to permit the testimony to be produced *under any method*. This is clearly shown by the letter addressed to the secretary, dated August 2, 1897 (p. 13 of Transcript), and his reply thereto, dated August 13, 1897 (Transcript, p. 14). As shown by the former letter, we had, just prior to that time, filed the required affidavit in the County Court, and had moved the Court for a rule against the *Secretary of the Treasury*, requesting him to furnish the desired copies. The Secretary's reply states that he will not furnish copies of the papers desired, "even upon a rule of the Court requesting it."

The District Court record does not show it, but the

records of the County Court do show that this rule against the Secretary was refused because he was not before the Court, and was some six hundred miles beyond the jurisdiction of the Court, the Court saying in substance that it would be a mere farce to issue a rule when there was not and could not be any service of process. This also shows the unsoundness of the regulation. The rule against the *Secretary*, above referred to, must not be confounded with the rule and proceedings against the *Collector*, which was sustained.

Review of authorities cited by District Court.

The principles decided in the authorities cited by the lower Court have no application to the case at bar, and especially not to the basic principle.

The District Court, in summing up the whole matter, on pages 26 and 27 of the transcript, gives twelve reasons in support of his decision. Then, as a summing of these twelve reasons, on page 27, he says:

"The proposition underlying all the others is that "nobody can acquire any control over or right in "this class of papers belonging to the United States "in any manner except by its authority."

We have previously shown the great error committed by attempting in this manner to shift the burden from where it rightfully belongs, and this "underlying proposition" being erroneous, all the others resting upon it must be erroneous also.

A number of authorities are cited by the Court and not a single one of them has any real bearing on the case and especially as bearing on this underlying principle.

We will refer to them briefly.

Greenleaf on Evidence, Secs. 250-1, and Jones' Law of Evidence, section 780, are not applicable for the reason that the evidence sought is not of the

nature of "state secrets" or "privileged communications." United States *v.* Eliason, 16 Pet., 291, passes only upon the question of allowing pay for extra services to officers in the army, contrary to army regulations.

Hagood *v.* Southern, 117 U. S.; Cunningham *v.* Macon, &c., 109 U. S.; Carr *v.* United States, 98 U. S.; Virginia Coupon Cases, 114 U. S.; and *Ex parte* Ayers, 123 U. S., all sustain, admit and confirm the principle contended for by us, though sometimes distinguishing it, with some dissenting opinions as to some phases of it, which are hardly material to the principle bearing upon this case. Virginia Coupon Cases, 114 U. S., 290-291, perhaps announces it more clearly and it is approved and distinguished afterwards in Hagood *v.* Southern, 117 U. S., 69-70, and more notably perhaps in the later case of Ayers, 123 U. S. As we understand the principle there laid down (114 U. S., 290-291) it is beyond the power of any of the executive officers of the Government rightfully to accomplish the purpose of shielding themselves behind the Government, when attempting to act in its name contrary to the laws, and the attempt to accomplish any such thing recoils against themselves alone, as wrongdoers, whether undertaken by misapprehension as to their powers or duties or otherwise.

The United States by its laws, correctly understood and permitted to be carried out to their righteous ends, can no more decline to permit one of its constituent States to get at the facts sought to be gotten at for use as evidence for the purpose desired, than the physical body can live and refuse to allow the heart to propel the blood from it through the arteries and veins of the body to its limbs or other members forming a part of it. The principle of such a declination or refusal, carried out to its full extent, would as certainly culminate in the destruction of the body politic as would the cessation of the flowing of the

blood from the heart of the physical body result in its death and disintegration.

Ex parte Reed, 100 U. S., 23, we have already referred to as showing that a writ of *habeas corpus* cannot be made to perform the function of a writ of error, and by it thus take from a lower court the decision of questions within its jurisdiction. That was a case arising out of the reglations of the Navy Department; and the only other question decided in it was as to the force of rules and regulations of an officer in the navy. In this department the officers as well as those in the army, have to sign and subscribe to regulations after the same manner as an ordinary person might subscribe to a contract growing out of an ordinary business transaction by which he would be bound, and it was in this case that such signing of the many regulations was binding upon a paymaster's clerk, upon a decision against him by a court martial in pursuance of such regulations. The very object of requiring the men enlisting in the department of the army and navy to sign these rules and regulations is mainly, as we suppose, by the obligation thus imposed upon them with their consent, to take them out from under the very provisions of the rules of law under which others of us live, and to have their written obligations to abide by them. Having so signed and agreed why should they not be bound by them? Upon tracing the matter back through the pamphlets gotten up at the instance and for the benefit of the Internal Revenue Department, it will be seen that those having charge of it have been attempting, on these decisions growing out of precedents in cases from the Departments of the Army and Navy, to build up a kind of like precedent for the Internal Revenue Department and carry it to such extent as to claim for the regulations made by its officers the force and effect of regular laws even for those outside of it and the courts as well. Boyd *v.* U. S. has been referred to and commented upon in a former part of this brief.

The noted case of Abelman *v.* Booth, 21 How., 506, passes upon no principle involved here. The principle there decided was that a State court has no right under the law to entertain jurisdiction of *habeas corpus* proceedings to release one under trial and sentence of a United States court, after the fact of the trial or proceedings in such court is brought to its cognizance. We most cheerfully grant the supremacy of the United States Courts in such cases and insist that they, and not the executive officers of the Government, are authorized to decide what are the rules of law as to evidence, and therefore our appeal to this Honorable Court.

A part of Justice Bradley's opinion in the Siebold case, quoted in the Huttman case (70 Fed. Rep.), relied upon for the petitioner, is very pertinent in this:

"The true interest of the people of this country "requires that *both* the national and the State gov- "ernments should be allowed, without *jealous* inter- "ference on *either* side, to exercise all the powers "which respectively belong to them according to a "fair and practical construction of the Constitution. "*State rights* and the *rights of the United States* "should be *equally respected. Both are essential* "to the *preservation of our liberties* and the *per-* "*petuity* of our institutions. But in endeavoring "to vindicate the one we should not allow our zeal "to nullify or impair the other. * * * This power "to enforce its laws and to execute its functions in all "places *does not derogate from the power of the* "*State to execute its laws at the same time and* "*in the same places. The one does not exclude* "*the other*, except where both cannot be executed "at the same time" (100 U. S., 394-5).

While it may be true, as stated in argument in the Court below, and in the opinion in the Huttman or Weeks case, that the United States cannot be required to obtain evidence for the use of the State or its citizens; *yet when it has obtained it*, and has in the custody of its officers facts which will make

competent, pertinent, most exact and truthful evidence in a proceeding in which one of its constituent States is interested as a party, *can any good reason be given why* its officers, heads of departments or inferiors should be allowed to prevent its use as *evidence?* Certainly *it* can be used by *both without injury to either.* To hold otherwise places the United States Government at variance with the State governments, without reason or benefit. It, through its storekeepers, who make the reports referred to, carries the keys to the buildings which contain all the property which is claimed to be subject to State taxes (and which it does tax by the express permission of the United States), and allows no one to enter but by its consent.

Conclusion.

The facts sought as evidence appear in reports of record—easy to look at—reported upon over and over again—month by month—every month of the year—simple facts as to quantity of liquors on hand. What good reason in law, morals, or otherwise can there be why the Collector should not be permitted to testify as to such quantity on behalf of his State, for the purpose of getting at the fact for State and county taxation? We can imagine none.

What "privilege" can there be in any "communication" which Block & Sons may have made as to the amount of such liquors to the Collector of Internal Revenue, or any other person, which they are entitled to have held back from the State of Kentucky when it is seeking to have the true quantity ascertained for the purpose of imposing upon them, or upon such liquors, the same rate of taxation according to value as is imposed upon other persons having property in the State subject to taxation? Absolutely none.

The trade in this species of property costs the State for the maintenance of good government, law and order very greatly more than any other and

many, many, times more than the amount of taxes derived from it, and we insist that the United States Government should not be continued to be placed in the false position of assisting the owners of such property in hiding and concealing the true amount of it so that it may escape from regular taxation by the State on the uniform basis along with other property. That the United States Government should continue to be placed in such false position by any of its officers operates as a *quasi* fraud against the State.

The "lawful custodian" of these records is not permitted to act in the place of the judiciary and say that the disclosure of such information is "incompatible with the public interest." The custodian of a document or paper, the nature of the information in which was not and could not be so well known, might possibly in some states of case be allowed to take advantage of his government, or the State seeking information from it, for use in evidence, but such can not be the case, as to a record or report like this.

It is true, as stated (p. 20) in the opinion of the Court below that:

> "Under the law in this exceptional instance of a "distiller the property of the citizen is arbitrarily "laid hold of by the United States as soon as it is "manufactured, and is kept under its control until "the tax is paid, possibly eight years afterwards. "Meantime, these reports must be made. So far as "the information contained in these reports is ob-"tained from the distiller, it is EXTORTED for the "sole purpose of enabling the United States to as-"certain and collect from him its revenues. This "purpose is all that relieves both this act and that "of so long holding his property from being mere "tyranny,"

and this is given in the opinion as a reason why the information, merely as to the quantity of the property at a given period in each year, should not be given in evidence by the custodian of the record evi-

dencing it. This is clearly not a valid or legal reason for so withholding it. This so-called tyrannical act on the part of the United States in laying "hold of" and keeping this kind of property "under its control," and preventing the actual collection of State taxes against it possibly for eight years, until the United States tax is paid, when looked at from the standpoint of right, reason and logic is the very best of reasons why the United States, under the rules of that law, is under even the stronger obligation, to permit to be made known in evidence the information contained in its records as to the amount of it at any stated time—stronger obligation than it could be as to an any other class of property, or evidence in its possession derived in any other way.

This property "is laid hold of by the United States" only for the purpose of getting the tax due to it. It is not held after such payment is made. The delaying of the time for payment is for the benefit of the distiller only.

It seems clear to us that it is a mistake to use the words extortion or "extorted" with reference to the question of requiring the distiller also, to give the information contained in the reports from him as to the quantity of such liquors manufactured by him, when such information is sought for the purpose of taxation. Information as to mere quantity when required of the owner of property for purpose of taxation can hardly be said to be "extorted."

That these reports, whether from the distiller himself or the storekeeper in actual custody and control of the liquors and of the warehouses in which they are stored, "were exacted for the sole purpose of collecting revenue" is no right reason for taking the evidence contained in them and pertinent to any issue joined, out from under the regular rules of evidence of the common law as accepted and adjudged.

The use of the facts contained in these reports as evidence, which is all the State was seeking, does

not interfere with, abridge or render less valuable in any way the property right the United States has in them of whatever "peculiar character" it may be.

No "property" right in them is in anywise affected in these proceedings or in the proceedings in the State court.

It is desired to have merely as evidence the facts contained in the reports, as the Court below states it, "for the single quality it is supposed to have "of silently testifying upon the issues involved in "the case against Elias Block & Sons." We think the Court's "logic" is very wide of the mark when he followed up the statement with this.

"No *logic* is perceived in the possible suggestion "that that makes a difference in right, though it "may make the use more desirable in fact."

Our logic on this point is shown by calling to mind that if one desires to deprive his neighbor of any property right he has in anything, he must first compensate and obtain the neighbor's consent to part with such right; but if one's neighbor has in his possession any written document, report or papers of any kind that will show the truth as to any issue of fact in a court between one and another, one's neighbor is by the rules of law and evidence, under legal obligation to produce and exhibit it in evidence or state from it the facts as to its contents and permit an inspection thereof and a copy to be taken, for such use as evidence, when called upon as a witness to do so, and the neighbor's abstract property right in the paper or document is not thereby interfered with in any degree. This legal obligation is what government says we owe to each other that truth and right may prevail. Does a government, enforcing this rule of action between man and man, claim a different and contrary rule for itself?

The same predilection of the learned Judge of the Court below in favor of the view taken by the

bureau of the department, of which he was formerly the head, causes him to err in his logic and reasoning as to the application of the principle decided in the case of Hirsch, 74 Fed., 928. As to that case he admits and states in his opinion (p. 19):

"The learned Judge, in aid of the State Court "proceedings, seems to have held that the spirit of "Section 3240 of the Revised Statutes required a "construction that would compel internal revenue "officers to testify in all cases where the informa- "tion was sought by the State as to who were re- "tail dealers in distilled spirits."

He then proceeds to argue from such statement this rule of construction:

"If that be correct, it would seem to follow that "the same liberality of construction would, on the "other hand, require that the spirit of Section 3167 "forbids any collector to give the information de- "manded of the petitioner in cases like this; and, "indeed, the public policy of the United States "might also seem to require this construction. "That section prohibits the Collector and other in- "ternal revenue officers from disclosing certain in- "formation they acquire from visits to distilleries, "&c."

How can "the same liberality of construction" as to that section seem to require it to be held that the *mere quantity* of liquors on hand at any time should not be divulged to a court by such officer as a witness in a court proceeding to ascertain such quantity for State taxation, from which it had been wrongfully omitted, when Section 3167 referred to by him merely provides for fine and imprisonment of such officer if he

"* * * divulged to any party, or makes known "in any other manner than may be provided by "law, the operations, style of work or apparatus of "any manufacturer or producer visited by him in "the discharge of his official duties. * * *"

The bearing of this section on the distiller evidently applies only to his secrets as to *operations*,

mode of manufacture and *apparatus used* in connection with the production of the spirits. Nothing more.

Thus the law (using the word used by the learned Judge below) "prohibits" this much for the benefit, and unquestionably at the instance, of the distillers themselves. It thus appears that they themselves have sought and obtained "prohibition" to this extent for their benefit. Now it appears that these distillers, defendants in the proceedings in the State court, desire to have the ordinary common rules of law as to evidence also prohibited in proceedings by the State against them, seeking to list such property as they have wrongfully omitted from return for State taxation. We hardly believe that any great proportion or large combination of men or corporations engaged in the manufacture of such property would, openly, attempt to accomplish such prohibition of the rules of evidence to which others agree for the common good to submit themselves. They would, however, doubtless be strongly tempted to quickly avail themselves of the precedent made for them in these proceedings, if not speedily corrected.

If, however, as the learned Judge of the Court below admits to have been decided, and affirmed by the Circuit Court of Appeals for the Second Circuit,

> "the spirit of Section 3240 of the Revised Statutes "required a construction that would compel the "officers of internal revenue to testify in all cases "where information was sought by the State as to "who were retail dealers in distilled spirits,"

when the State is prosecuting criminal proceedings violative of the State laws certainly "logic" and right reason in following out this spirit of construction of the same section, instead of excusing such officers from testifying as to the mere quantity of liquors held in bond, would the *more certainly and clearly require them to testify on this point also*, inasmuch as the State is under the greater necessity to collect taxes in order to defray its ordinary

expenses in maintaining its very existence and organization.

But Section 3243 referred to by the learned Judge of the Court below (p. 25) also stands in the way of any *such* liberality of construction as the District Court below attempts to reason out for Section 3167 on page 19. It expressly recognizes such co ordinate right of taxation by the State, closing in these words: "* * * nor shall the payment of any "such tax be held to prohibit any State from plac- "ing a duty or tax on the same trade or business "for State or other purposes."

Certainly, *if any statute*, of the United States, as claimed by the District Court, in the opinion, is needed to sustain our position and right, as claimed, such right is sustained by the provisions of Secs. 721 and 914 which make the rules of the common law, &c., the rules for the United States.

The State is not, as we understand it, seeking, in the State court proceedings, to "impose duties upon a Federal officer as such," as the learned Judge of court below assumes (p. 22). It merely seeks to require sucl Federal officer to perform the duty he owes his State, as a *witness*, and imposed upon him by the rules of the law of evidence, and which he would quite likely and willingly discharge, did not his supeior officer, at the head of the bureau, under a mistaken notion of the law and his own powers under it, forbid him to discharge it. The State does not derive its right to this evidence under the rules of law from him. It merely gets the evidence through his instrumentality as a mere witness, being the custodian, as he himself says, of such reports *for* the United States. The right under the rules of law to the use, in evidence, of the facts shown by the reports is derived from the United States Government and laws. Further, the competency and admissibility of the facts as evidence being within the province of the State Court alone, it was error in the learned Judge of the District Court to allow himself, as he states

(p. 26), to have "been influenced somewhat by the "conviction that if the copies of the reports and the "desired information were obtained from the col- "lector they would be altogether inadmissible and "incompetent as evidence, and that it would be ul- "timately so held by the State Court."

This error is the more glaring in view of the fact that the learned Judge of the State Court in his opinion and judgment then in the record in the District Court (p. 7), had already passed upon this question and adjudged as follows:

"It is therefore ordered and adjudged by the "Court that the plaintiff's motions be sustained, "and that the *plaintiff is entitled to use as evi- "dence* the facts stated in the reports and papers "filed by any or all of the defendants in the office "of the collector of Internal Revenue for the Sixth "District of Kentucky, and *also such facts as are "stated in the reports* made to said office by certain "officers *known as United States storekeepers, and "any other similar records*, papers, documents, or "exemplifications in said office tending to show the "amount of liquors on hand at the distillery of the "defendants on the 15th day of September, 1889, "1890, 1891, 1893, 1894, 1895, 1896, and on the 15th "day of November, 1892; * * *."

The action we are prosecuting is for the benefit of a sovereign *constituent* State; it is a part and parcel of the United States; the action is *for taxes, without which the State cannot maintain itself*, a public matter in which all the citizens of the State are interested; the *principle* involved is of *vital* importance to *all* the States, and therefore effects the interests of the whole United States. There can be no possible doubt that the record sought as evidence is true, and will establish the truth in Court. The only possible injury (so-called) that can result to any one by the disclosure would be to the defendants in the State Court, and that is not in fact any injury to them. It could only cause them to pay what they honestly owe, if they owe anything. If they

do not owe anything, the evidence desired will be the clearest and fullest vindication that can be obtained for them.

The public and important nature of this question has impelled us to argue the matter at this length in an attempt to bring out all its phases and thus make this brief longer than we would have otherwise deemed proper.

We ask an early consideration of the appeal, in view of the public nature of the question, and a reversal of the judgment of the District Court with proper instructions as to having the appellee brought before it and remanded to the custody of the appellant or his successor as jailor of Kenton County, Ky., to be dealt with as the State Court may deem proper, in the event he continues to refuse to testify and produce the records.

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APPENDIX.

KENTUCKY STATUTES.

Assessment of Distilled Spirits.

Sec. 4105. *Distiller and bonded warehouse owner to report to Auditor.* Every owner or proprietor of a distillery bonded warehouse in which distilled spirits are stored shall, between the fifteenth day of September and the first day of October of each year, report to the Auditor of Public Accounts, in writing, sworn to by the person making the report; or, if the owner or proprietor of such warehouse be a corporation, the report shall be made and sworn to by its principal officer or manager in charge. Such report shall show the quantity and kind of spirits in such warehouses on the fifteenth day of September in the year the statement is required to be made, the dates when made, the serial number of packages in which it is contained; the county, city, town or taxing district in which the warehouse is situated; whether or not the United States Government tax has been paid thereon, if not, the date of expiration of the bonded period; the fair cash value of the spirits estimated at the price it would bring at a fair voluntary sale, and such other facts pertaining to such spirits as the Auditor may require.

Sec. 4106. *Reports to be submitted to board of valuation—who constitute—record.* That the said reports shall be, by the Auditor of Public Accounts, submitted to a board of valuation and assessment composed of the Auditor of Public Accounts, the Treasurer of the State and the Secretary of State, who are hereby constituted such board; and said board shall fix the values for the purposes of taxation under this act, and assess the same accordingly, and shall keep a record of their valuations and assessments in a book provided for that purpose, and said record shall be evidence in all courts of the proceedings of said board.

Sec. 4107. *Board to fix value—may change—action of board final.* The Auditor of Public Accounts shall file such reports with the board, which shall assess the spirits for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. The board shall at once notify the owner or proprietor of the warehouse of the amount

so fixed; and such owner or proprietor shall have thirty days, after receiving the notice. to go before the board and ask a change of the valuation, and may introduce evidence; and the board may make such changes as it may deem proper. The action of the board shall be final.

SEC. 4108. *Values certified to auditor and clerks, and furnished collecting officer.* Immediately after finally fixing such values, the board shall certify to the Auditor of Public Accounts the value of the spirits as assessed for State tax; and said officer shall certify to the county clerk of the respective counties the amount liable for county, city, town or district taxation, and the date when the bonded period will expire on such spirits. The report shall be by the county clerk filed in his office, and by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

SEC. 4109. *Custodian of spirits liable for tax lien.* Any person or corporation having the custody of such spirits on the fifteenth day of September in the year the assessment is made, shall be liable for all taxes due thereon, together with all interests and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from the day of payment.

SEC. 4110. *Tax on spirits on which government tax not paid when due—interest thereon.* Taxes on distilled spirits which may be assessed while in bonded warehouse, and on which the United States Government tax has not been paid, or will not become due before the first day of March after the assessment shall be due on the first day of March after the assessment shall be due on the first day of January, May and September next after the said government tax becomes due or be paid, or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear interest as other taxes.

SEC. 4111. *Owner or proprietor of warehouse to report and pay State tax.* Every owner or proprietor of a bonded warehouse in which distilled spirits may be stored, as contemplated in the preceding section, shall, on the first day of January, May and September next after said Government tax shall

have been paid, become due, or be removed from the warehouse, make and transmit to the Auditor of Public Accounts, and the clerk of the county court in which the spirits may have been at the time of the assessment, a statement, sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the Government tax has been paid or become due, and what spirits have been removed from the warehouse during the preceding four months; the years in which such spirits were assessed for taxation; the serial number of packages in which it is contained, and county, city, town or taxing district in which the warehouse is situated in which the spirits were stored at the time of the assessment, and shall, at the same time, pay all taxes and interest on such spirits due the State, county, taxing district, city or town to the officer entitled to receive the same.

SEC. 4112. On the failure of any owner or proprietor of any such warehouse to pay the taxes and interest, within five days after the same becomes due, he shall be deemed delinquent, and a penalty of eight per. cent. on each year's taxes due on the spirits shall attach, and the officer authorized to collect such taxes shall at once cause such proceeding to be instituted for the collection of such taxes, with interest and penalties as may be provided by law for the collection of other delinquent taxes.

SEC. 4113. *Board to assess upon failure to report.* If any warehouseman or custodian of such spirits fail to make the report as required in section four thousand one hundred and five of this article, the board shall ascertain the necessary facts therein required to be reported, and the same shall be assessed and taxes collected thereon, with interest and penalties, as though regularly reported.

SEC. 4114. *Reports—penalty for failure to make or for false report.* Every person whose duty it is to make the reports as herein required, who shall willfully fail to do so, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than five hundred nor more than one thousand dollars; and any person who shall make a false report with the intent to evade the payment of taxes shall be deemed guilty of false swearing, and, on conviction, be punished as prescribed by law for such crimes.

SEC. 535. *Punishment for disobedience.*—Disobedience of a subpœna; intentional evasion of a service of it by concealment or otherwise; concealment or removal of a minor to prevent service of a subpœna upon him, or preventing his attendance as a witness by a person having control of him; or a refusal to be sworn or to *answer as a witness*, or to subscribe an affidavit or deposition when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.

SEC. 538. *Extent of punishment for disobedience.*—The punishment for the contempt mentioned in Section 525 shall be by fine, not exceeding thirty dollars, and imprisonment, not exceeding twenty-four hours; but an officer imposing such punishment shall promptly report his action, and the reasons therefor, to the Court in which the action is pending; and the Court may vacate or modify the order of the officer, and shall render judgment for the fine imposed by the officer, or so much thereof as is approved by the Court. If a witness refuse to testify, or to be sworn, or to give a deposition, he shall be imprisoned so long as he refuses; and, if the Court finally adjourn before he submits, he shall remain in prison until the next term, or until he testifies before an officer who is authorized to take his testimony. The final disposition of the case in which he so refuses shall discharge him from imprisonment.